U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: July 8, 1998

Case No.: **97 INA 539**

In the Matter of:

PEKING PALACE OF FALMOUTH, INC.,
Employer,

On behalf of:

HUANG CHAO CHIN LIU,
Alien

Appearance: W.W. Tsai, Esq. of Bethesda, Maryland, for the Employer.

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of HUANG CHAO CHIN LIU, "**PEKING PALACE OF FALMOUTH, INC.,** Employer, ("Alien") by PEKING PALACE OF FALMOUTH, INC., ("Employer") under § 212(a)(5) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act") and the regulations promulgated thereunder, 20 CFR Part 656.[1] After the Certifying Officer ("CO") of the U.S. Department of Labor at Boston, Massachusetts, denied the application, the Employer requested review pursuant to 20 CFR § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the *Dictionary of Occupational Titles*, published by the Employment and Training Administration of the U. S. Department of Labor.

application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On March 25, 1996, the Employer applied for labor certification on behalf of the Alien to fill the position of "Bookkeeper" in its restaurant business. AF 54. The Employer described the position as follows:

> Keep books and records of account receivable and accounts payable in Chinese; keep records of all expenses and income and all financial matters of the restaurant business in Chinese.

AF 54. The position was classified as Bookkeeper under DOT Occupation Code No. 210.382-014.[2] Although a formal education consisting of only six years of grade school was required, the Employer required two years of experience in the Job Offered. This was a thirty-five to forty hour a week position with hours from 12:00 A.M., to 8:00 P.M., at a wage rate of $12.25 per hour, with no provision for overtime work.[3] AF 56-57. None of the four qualified U. S. workers who responded to Employer's recruiting advertisement was hired because none of them possessed the required two years experience as a bookkeeper.AF 31-32-36.

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[2] **210.382-014, BOOKKEEPER (Clerical)** Keeps records of financial transactions for establishment, using calculator and computer: Verifies, allocates, and posts details of business transactions to subsidiary accounts in journals of computer files from documents, such as sales slips, invoices, receipts, check stubs, and computer printouts. Summarizes details in separate ledgers or computer files and transfers data to general ledger, using calculator or computer. Reconciles and balances accounts. May compile reports to show statistics, such as cash receipts and expenditures, accounts payable and receivable, profit and loss, and other items pertinent to operation of business. May calculate employee wages from plant records or time cards and prepare checks for payment of wages. May prepare withholding, Social Security, and other tax reports. May compute, type, and mail monthly statements to customers. May be designated according to kind of records of financial transactions kept, such as Accounts-Receivable Bookkeeper (clerical), and Accounts-Payable Bookkeeper (clerical). May complete records to or through trial balance. GOE: 07.02.01 STRENGTH: S GED: R4 M4 L3 SVP: 5 DLU:77

[3] A national of Taiwan, the Alien was born November 1, 1952, and completed elementary and middle school in Taiwan in 1970. The Alien stated as Special Qualifications and Skills, "Able to cook books and records in Chinese." Although the work history of the Alien from 1970 to 1991 was not given, from 1991 to 1993 he was employed by a "business corporation" in Taiwan where his duties, "Bookkeeper/Accounting," were substantially identical to the duties stated in Form ETA 750 A at Item 13. The Alien was unemployed from June 1993 to the date of application.

Notice of Findings. In the Notice of Findings (NOF) issued on May 16, 1997, the CO denied certification, subject to Employer's rebuttal. Citing 20 CFR §§ 656.21(b)(2) and 656.21(b)(5), the CO found that the Employer's minimum job requirement was two years of experience in the Job Offered, noted that the Employer further specified that the Bookkeeper must, "Keep books and records of account receivable and accounts payable in Chinese; keep records of all expenses and income and all financial matters of the restaurant business in Chinese." (Emphasis added in the NOF at AF 24.) From this the CO reasoned that the Employer required that applicants be fluent in Chinese and concluded that this requirement appeared to be unduly restrictive, that it was tailored to meet the Alien's qualifications and background, and that it precluded the referral of otherwise qualified U. S. workers for this position. The CO then discussed the evidence to be filed in its rebuttal to prove Employer's business necessity for a bookkeeper who was fluent in Chinese.

Rebuttal. The Employer's rebuttal of June 12, 1997, addressed the issues identified in the NOF. AF 06-22. The Employer said that the business necessity of its requirement of Chinese language for the position was based on the circumstance that its owners cannot read English and their employees know little or no English. The Employers said,

> The worker[s] in our restaurant use Chinese language 100% by necessity except when communicating with our restaurant customers. ... My workers in the restaurant demand that weekly net pay check computation be written in Chinese for them to understand. ... The language problem is handled by our English speaking waiters/waitresses, [and] take out order [personnel].

In summary, continued the Employer,

> The bookkeeper will be required to keep books and records of daily sales and invoices, the payroll calculation in Chinese for my workers who cannot read English, keep records of all expenses such as food costs, Chinese groceries items, utilities, insurance, trash fees, beverages, etc. She needs to keep records of all financial matters of the restaurant business in Chinese for my husband and [me] to understand. As you are aware, it is difficult to find a translator (English-Chinese) to help us understand the financial records of our business. The need for Chinese language is a necessity for us to operate the restaurant business. All of my kitchen staffs cannot read English. We rely on the Chinese language to carry out daily operation of the business.

AF 8-9. The Employer's documentation consisted of invoices for food and other ingredients, and the dining room service orders describing the food served to customers. While Employer argued that the bookkeeper was required to read Chinese to record all of these items in the Employer's books, the invoices from the two suppliers offered contradicted this statement, as all of the invoices showed the quantity of each item shipped with the amount and inventory designation in Arabic numerals using standard English language unit and quantity references and presented

descriptions of all commodities purchased in both Chinese and English.[4]

Final Determination. The CO's Final Determination of November 15, 1996, denied Certification after examining the Employer's rebuttal. AF 04-05. Noting the Employer's rebuttal, the CO said it did not appear that failure to meet the Chinese language requirement would preclude a worker from performing the basic job duties associated with the position or that the Employer's preference could not be met by other methods. The CO said,

> Given the documentation submitted, it does not appear that the employer utilizes the Chinese language a substantial amount of time for the duties related to the position of Bookkeeper. It does not appear that fluency in Chinese is vital to the occupation of Bookkeeper or is needed to communicate with the employer's suppliers and/or patrons. The employer has failed to document that the Chinese language requirement arises from a business necessity; therefore, the job opportunity has not been described without unduly restrictive requirements."

AF 05. As the foreign language hiring criterion had not been documented to be essential to its business operation, the CO concluded that the rebuttal failed to establish the business necessity of requirement that the bookkeeper be fluent in Chinese in order to perform the job and denied certification for the reasons stated in the Final Determination. .

Appeal. Employer's appeal of July 15, 1997, repeated the rebuttal arguments and requested review by BALSA. The appeal was presented by the Employer's Treasurer who discussed the Employer's position in fluent English and concluded, nevertheless, that

> The need of Chinese language for my Chinese restaurant arises from business necessity because I do not understand the financial books and records unless is in Chinese.

AF 03. (Verbatim quotation without correction or change.)

Discussion

While an employer may adopt any qualifications it may fancy for the workers it hires in its business, the employer must comply with the Act and regulations when it seeks to apply such hiring criteria to U. S. job seekers in the course of testing the labor market in support of an application for alien labor certification. This is particularly the case where, as in this application, the employer's hiring criterion conflicts with the explicit prohibition of 20 CFR 656.21(b)(2)(C), a regulation adopted to implement the relief granted by the Act, which
provides that the job offer shall not include the capacity to communicate in a language other than English as a hiring criterion unless that requirement is adequately documented as arising from

[4]In examining the invoices of both J & D Import Co., Inc., and Chang Ching Produce, Inc., it is observed that notes on some of the invoices appeared to be written in Chinese script. AF 10-13.

business necessity.

The Board held in **Information Industries**, 88 INA 082 (Feb. 9, 1989)(*en banc*), that proof of business necessity under this subsection requires the employer to establish that (1) the foreign language requirement bears a reasonable relationship to the occupation in the context of its business and (2) that the use of the foreign language is essential to performing in a reasonable manner the job duties described in its application for alien labor certification. In proving the first prong of this test, it is helpful to show the volume of the employer's business that involves foreign language speaking customers or its business usage of that language. This may be demonstrated with proof as to (1) the customers, co-workers, or contractors who speak the foreign language and (2) the percentage of the employer's business that involves that language. In the context of the instant case, the second prong invites evidence that the employee communicates or reads in the foreign language while performing the job duties.

Business necessity is not proven under the first prong where the percentage of customers who speak the foreign language is small. **Felician College**, 87 INA 553 (May 12, 1989)(*en banc*). That share of employer's affected business must equal a percentage that is significant. **Raul Garcia, M.D.**, 89 INA 211 (Feb. 4, 1991). In **Washington International Consulting Group**, 87 INA 625 (Jun. 3, 1988), however, the Board held that a foreign language was not a necessity where only twenty-three per cent of the client base was affected by the employer's foreign language requirement. Both prongs of the **Information Industries** test must be met, however. Simply proving that a significant percentage of the employer's customers speaks the foreign language is not sufficient to establish business necessity under this subsection, unless the employer also proves the existence of a relationship between the customers' use of that foreign language and the job to be performed.[5]

In considering this case it is appropriate to observe first that labor certification is a privilege that the Act expressly confers by giving favored treatment to a limited class of alien workers, whose skills Congress seeks to bring to the U. S. labor market in order to satisfy a perceived need for their services. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The scope and nature of the grant of this statutory privilege is indicated in 20 CFR § 656.2(b), which quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on certification applicants, such as this Employer:

> "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to

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[5]In **Coker's Pedigree Seed Co.**, 88 INA 048 (Apr. 19, 1989)(*en banc*), and in **Hidalgo Truck Parts, Inc.**, *supra*, business necessity was established by evidence of significant customer dependence on Spanish-speaking employees. In **Splashware Company**, 90 INA 038 (Nov. 26, 1990), where the employer did show that a significant percentage of its clientele spoke the foreign language, the Board found that business necessity was not proven because no relationship was proven between the customers' use of the foreign language and the job to be performed.

receive such visa or such document, or is not subject to exclusion under any provision of this Act... ."[6]

Because the Employer's application seeks an exception to the Act's broad limits on immigration into the United States, the Panel will apply the Act and regulations to the Alien's entitlement to labor certification under the well-established principle that statutes granting exemptions from their general operation must be strictly construed, and that any doubt must be resolved against the party invoking such an exemption from a statute's general operation. See 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896). It follows that in pursuing alien labor certification, the applicable law required that the Employer and not the CO must carry the burden of proof as to all of the issues arising under this application for relief pursuant to the Act and regulations.

The CO's reasoning in the instant case was reviewed with the holdings in precedents cited above. The Employer did not persuade the CO because its argument as to its business necessity for a Bookkeeper fluent in the Chinese language turned entirely on the proof of the facts that the CO described in the NOF. After examining the Appellate File the Panel agrees that the Employer's rebuttal evidence failed to meet its burden of establishing business necessity because the Employer's proof is vague, incomplete, and limited to Employer's bare assertions, which it failed to support with relevant objective facts. **Analysts International Corporation**, 90 INA 387 (Jul. 30, 1991).[7]

In denying certification, the CO said at AF 05 the Employer did not prove that a Bookkeeper who was not fluent in Chinese could not perform the basic job duties of this position or that the Employer's preference for a Chinese speaking Bookkeeper could not be met by other methods. The CO added that the Employer did not show that the Chinese language was used for a substantial proportion of the time and functions of the Bookkeeper on the job. Specifically, the Employer failed to prove that fluency in Chinese was vital to the work of keeping its books, or was a necessary part of any communications with Employer's suppliers and customers. This inference is supported by the Panel's examination of the Appellate File, in which Edward R. Donovan, apparently Employer's CPA, explicitly noted on AF 33-36 that he had

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[6]The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

[7] Any written statements of the Employer could be accepted as documentation, if they were reasonably specific and indicated their sources or bases. The CO is not required to accept as credible or true the written statements Employer has supplied in lieu of independent documentation, but in considering them must give Employer's statements the weight they rationally deserve. The bare assertions that Employer's statements offered without supporting evidence were insufficient to carry its burden of proof. **Gencorp**, 87 INA 659 (Jan.13, 1988)(*en banc*). To the same effect see **Our Lady of Guadalupe School**, 88 INA 313 (Jun. 2, 1989); **Inter-World Immigration Service**, 88 INA 490 (Sep. 1, 1989), and **Tri-P's Corp.,** 88 INA 686 (Feb. 17, 1989)..

"considered" the resumes of U. S. workers Janet Chen-Griffin, Denise Caissie, Molly O'Connell, and Renee F. Taylor. The involvement of Mr. Donovan in this application is highly significant because 20 CFR § 656.20(b)(3)(ii) provides that,

> The employer's representative who interviews or considers U. S. workers for the job offered to the alien shall be the person who normally interviews or considers, on behalf of the employer, applicants for job opportunities such as that offered the alien, but which do not involve labor certifications.

While the record failed to identify Mr. Donovan, 20 CFR § 656.20(b)(3)(ii) requires the Panel to find that he is the person who normally interviews or considers job applicants on behalf of the employer. The Employer's arguments suggest that its owners need Mr.Donovan to be fluent in Chinese and able to read the Chinese characters in the exhibits appended to its rebuttal. The record, however, failed to indicate that Mr.Donovan is either conversant or literate in the Chinese language even though his role in its organization would have supported Employer's pivotal assertion of business necessity. Consequently, the documents in Employer's rebuttal that demonstrated that Mr. Donovan "considered" all four of the U. S. workers who applied for this position persuasively support the CO's finding that the Employer's preference for a Chinese speaking employee to handle its bookkeeping function could, in fact, "be met by other methods," since the Employer failed to prove that the Certified Public Accountant who normally interviews or considers on its behalf the applicants for bookkeeping positions in its corporation can either read or write or execute his normal functions as Certified Public Accountant by using the Chinese language.[8]

Although the Employer ostensibly complied with the directions to file evidence supporting its position on the issues raised in this case, the facts sought in the NOF were not proven by the Employer's assertions were limited to general statements that appeared unconnected with tangible data. Moreover, the Employer's proof failed to demonstrate a frequent and constant need to communicate in a foreign language in business transactions with business customers that was sufficient to affect the performance of the bookkeeper's duties. Compare **International Student Exchange of Iowa, Inc.**, 89 INA 261 (Apr. 30, 1991), *aff'd*, 89 INA 261 (Apr. 21, 1991)(*en banc*)(*per curiam*). It follows that the conclusion of the Certifying Officer that the Employer failed to establish that it is not feasible to hire a U. S. worker without the foreign language stated by the job description at item 13 of Form ETA 750 A. Consequently, the denial of alien labor certification was supported by the evidence of record and should be affirmed.

Accordingly, the following order will enter.

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[8]The Panel notes in this regard that the CO failed to cite any issue as to the rejection of qualified U. S. workers in violation of 20 CFR §§ 656.20(b)(3)(ii) and 656.20(c)(8) as a reason for denying certification.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within twenty days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within ten days of service of the petition and shall not exceed five, double-spaced, type-written pages. Upon the granting of the petition the Board may order briefs.